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IN THE

Supreme Court of the United States

October Term, 1967

No. 1286

BOSTON AND MAINE CORPORATION,

Respondent,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: April 5, 1968.

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Respondent, Boston and Maine Corporation, prays that this Court deny the petition of Chicago and North Western Railway Company dated April 1, 1968 which seeks a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, filed in the above entitled case on February 19, 1968.

STATEMENT OF THE CASE

The relevant facts here are quite simple. The petitioner, Chicago & Northwestern Railway Company (CNW) and a few other roads used self help to collect certain unliquidated claims for freight car rental against Boston and Maine Corporation (B&M). It did this by withholding the claimed amounts of freight car rental as an offset against interline freight balances due B&M. These freight balances arose from the collection from shippers by CNW of charges for the transportation of freight. The amount of the freight balances was not in dispute.

The payment of freight balances is governed by Mandatory Accounting Rules of the Association of American Railroads. (40a-42a)* Disputes under these Rules are arbitrable, and B&M invoked arbitration. (18a) B&M contended in the arbitration that the set-off or reduction of the amount of freight balances paid over to B&M by the amount of the car rental claims violated Freight Mandatory Rule 149 entitled "Settlement of Interline Balances." Rule 149 reads in part:

> "Settlements shall be made on net balances which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers."

B&M contended that no special arrangement had been made between it and C&NW and that the rule permitted no offsets of amounts not related to interline freight balances. The arbitrators agreed, holding that the Rules prohibited offsets against freight balances (12a), CNW appealed to an appellate arbitration tribunal which affirmed the award (23a), the District Court enforced the award (2a-4a), and the Court of Appeals summarily affirmed the District Court (1a).

The petition claims two errors: (1) that CNW was not allowed to interpose defenses and counterclaims in the District Court as to matters the arbitrators "held they were without power to consider," and (2) that the granting of summary affirmance by the Second Circuit was an abuse of discretion (Petition, p. 2).

ARGUMENT

CNW asserts that the Federal Arbitration Act does not bar it from asserting as a defense to the award (1) that the interline freight balances had been "paid" by offsetting

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* References are to the Petition for Writ of Certiorari (hereinafter "Petition"), and the appendix thereto.

them against amounts claimed for freight car rental or (2) from asserting a counterclaim for such balances as a bar to enforcement of the award (Petition, p. 9). However, the fact is that the very issue submitted to the arbitrators for final and binding determination was whether such offset was prohibited under the Mandatory Rules by which the parties had agreed to be bound. Petitioner urges here the wholly untenable argument that it had a right to relitigate the very question decided by the arbitrators. Here the parties agreed to binding arbitration of a dispute involving the application of the provisions of a contract. The question was whether a party may offset one claim against another. When the arbitrator construes the contract as prohibiting offsets, that ends the matter. A court may not reconsider the claimed right of offset when it is reasserted in the action to enforce the award.

Petitioner's assertion that the arbitrators held that they did not have power to decide whether CNW could offset freight car rental claims against interline freight balances is pure fantasy.

Arbitrator McWhite ruled:

> "In dealing strictly with the interpretation of Freight Mandatory Rule 149 it provides in clear and unambiguous language that settlements shall be made on net balances of freight revenue, including advances and prepay, which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers. No provisions whatever are made for set-offs, nor does the file indicate that any special arrangements were made . . . " (14a, 15a).

Arbitrator Goodyear, Chairman said:

> "The issue to be determined is whether the C&NW was within their rights under the Accounting

> Rules in refusing to honor the B&M's sight drafts covering settlement of Interline Freight Traffic Balances. I agree with Arbitrators Plumley and McWhite that in view of Mandatory Freight Rule 149, that settlements shall be made on net balances which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers. I find there is no evidence in these papers to show that any special arrangements were ever made. . . ." (17a)

The Arbitration Appeal Committee was also unanimous. Appellate arbitrator Cooper ruled:

> "Coming to Freight Mandatory Rule 149, no lengthy dissertation is necessary. The rule is subject to only one interpretation, i.e., settlements shall be made on net balances whether freight charges are prepaid or collect, advances and prepaid to be included. To take the position of the C&NW by using Rule 149 for off-setting per diem [car rental] claims due from another carrier, then Rule 149 could be used under any conditions that might occur, e.g. a carrier could purchase material from another carrier, and due to lack of payment a carrier could use Rule 149 to off-set amount due from sale of its property. It is my firm belief that the C&NW violated the provisions of Freight Mandatory Rule 149." (24a)

Appellate arbitrator Allen, Chairman, ruled:

> "This matter now resolves itself to the basic issue as to whether the C&NW violated the provisions of Freight Mandatory Rule 149. The text of Rule 149 is rigid as to interpretation leaving no doubt whatsoever but that it spells out one conclusive requirement to the effect that settlements of inter-

line balances shall be made on net balances whether freight charges are prepaid or collect, advances and prepaid included. To attempt arbitrary collection of any amount other than those contemplated under Rule 149 is in violation thereof." (26a)

What the arbitrators properly did was hold that the Mandatory Rules prohibit such offsets notwithstanding legal arguments advanced by CNW to the effect that generally, in the absence of contractual provisions to the contrary, offset is permissible.

The District Court herein did not refuse to allow CNW to "interpose" the counterclaim as CNW asserts in its first Question. On the contrary the District Court merely ordered the counterclaim consolidated with identical car rental claims assered by CNW in a case previously commenced by it in the same court and still pending. These claims for car rental have not been prejudiced in the least.

The District Court obviously had discretion to sever the counterclaims herein and consolidate them with the prior CNW action. CNW itself moved for consolidation of this action with its prior suit, and the Court below granted that motion to the extent of consolidating the counterclaims. (7a) There being no final determination of the counterclaims the action of the District Court in severing and consolidating the counterclaims is purely discretionary and not reviewable except under the interlocutory appeal provision [28 U. S. C. § 1292(b)] not applicable here.

Further, since the arbitrators held that the Mandatory Rules prohibit offset of freight car rental claims against freight balances, the award would obviously be nullified if a counterclaim for the same freight car rental claims were permitted to bar enforcement of the award.

CNW asserts that the arbitrators' determination goes only to the right to offset under the Mandatory Rules and not to the right to offset in an action to enforce the award. On the contrary, CNW has simply contracted, via the Mandatory Rules, not to offset any claim against freight balances. That contract was so construed by the arbitrators, and this construction is just as final and binding as a court's determination.

It is respectfully submitted that not only is no substantial issue with respect to the Federal Arbitration Act raised herein, but that there is and can be no challenge to the validity of the award, which is enforceable under the most basic principles of arbitration law.

CNW also asserts that the summary affirmance by the Court of Appeals was an abuse of discretion in that petitioner was deprived of an opportunity to present its case in full detail. This argument is also spurious. Petitioner had already had the benefit of one extension of the time for docketing its appeal from November 20, 1967 to January 9, 1968. It had also already had a one week extension of time within which to file its brief and had moved for an additional month's time when B&M cross moved for summary affirmance. It had thus already had considerably more time than is provided in the rules within which to prepare and file a brief. Moreover, it did file a memorandum in opposition to the cross motion and presented its oral arguments to the Second Circuit. It did not request additional time within which to file a supplementary memorandum.

The appeal was, in fact, frivolous. CNW's arguments were presented to the Court of Appeals in a companion case which involved substantially the same issues. *Boston & Maine Corp.* v. *Chicago, B. & Q. R. R.*, 381 F. 2d 36 (2d Cir. 1967) (*per curiam*), *affirming* 258 F. Supp. 930 (S. D. N. Y. 1966). The same counsel appeared in both cases, and the plaintiff was the same in both cases. The

case involved enforcement of an award by the same arbitrators deciding the same offset question. In the *CB&Q* appeal, the Court of Appeals affirmed, with a short *per curiam* opinion. When identical issues are repeatedly brought before the same court, particularly in attempts to prevent or delay enforcement of valid arbitration awards, summary disposition is clearly justified.

The legal authority cited in the Petition is directly in point—*Moist* v. *Belk,* 380 F. 2d 721 (6th Cir.) *cert. denied* 389 U. S. 960 (1967); *Ginsburg* v. *American Bar Ass'n,* 277 F. 2d 801 (7th Cir.) *cert denied* 364 U. S. 829 (1960). That authority lends no support to petitioners' assertions for in each case the Court granted a motion to affirm. In particular, the *Moist* case points out that summary affirmance should be granted in at least three situations: 1) where a wholly unmeritorious appeal threatens to frustrate arbitration, 2) where there is a second application to a court which has previously decided the question (constitutional issue), 3) where the appeal is frivolous. All three are applicable here.

Rule 19(b) of the Rules of the United States Court of Appeals for the Second Circuit provides:

> "Motions seeking substantive or significant procedural relief will normally be determined by a panel conducting a regular session of the Court. These include, without limitations, motions seeking . . . summary affirmance. . . ."

There is no assertion that the motion to affirm was improper under the Rules or procedurally defective, or even any showing that petitioner had anything to say that wasn't said.

The claim by petitioner that due process was not afforded is truly indefensible when this petitioner has

presented its claim to an arbitration panel, an appellate arbitration panel, a United States District Court and a United States Court of Appeals. As the Second Circuit recently pointed out in an appeal from a judgment confirming an arbitration award, "extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings." *Saxis S.S. Co.* v. *Multifacs Int'l Traders, Inc.*, 375 F. 2d 577 (2d Cir. 1967).

Conclusion

The petition for certiorari does not raise any question that is even arguably substantial and should be denied forthwith. Respondent respectfully requests that reasonable damages should be assessed herein pursuant to paragraph 4 of this Court's Rule 56. The nominal amount of one thousand ($1000) would defray part of the expenses incurred by respondent as a result of this dilatory petition.

Respectfully submitted,

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